Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. _____

SILVER DOLLAR MINING CO., et al.,

Petitioners,

v.

PVO INTERNATIONAL, INC.
a California corporation and POLYTRON COMPANY,
now known as POLYCO LIQUIDATING CORPORATION,
a California corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 30, 1978

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CASES

STATUTES INVOLVED

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The Petitioners, SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEZ MINING COMPANY, an Idaho corporation; SILVER SURPRISE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARCK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation, respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on April 14, 1978, and summarily reverse the decision of the court below.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

There was no formal opinion of the District Court. The order granting the motion for Summary Judgment and Judgment of the District Court are reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the District Court was entered on May 6, 1976 (Appendix B, infra, pg. 28). The opinion of the Circuit Court (Appendix A, infra, pg. 8) was entered on April 14, 1978. The jurisdiction of this court is involked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is error for the Ninth Circuit Court of Appeals in a case founded upon diversity jurisdiction to conclude and adjudge that one joint venturer to a mining operation is an immune employer from third-party liability for contribution and indemnity under the Workmen's Compensation Act of Idaho, and the other co-venturers are not likewise so immune.

2. Whether it is error for the Ninth Circuit Court of Appeals, in a diversity case, to reject a decision of the highest Court of the State of Idaho which holds that each co-venturer in a joint venture is an employer under the Idaho Workmen's Compensation Act for all employees of the co-venturer.

3. Whether it is error for the Ninth Circuit Court of Appeals to apply a "federal interpretation" of Idaho state statutes and ignore the express state court constructions of the same statutes.

4. Whether it is error for the Ninth Circuit Court of Appeals to conclude that joint venturers, in a mining operation, have one legal status for one phase of the litigation and an exactly opposite legal status in relation to another aspect of the litigation.

5. Whether mining companies which enter into an agreement to combine their property, money, skills and knowledge to carry on a joint mining venture for profit and pay for workmen's compensation insurance are "employers" of their workers so that they are immune from liability as against a third party tortfeaser's suit for contribution and indemnification, where pursuant to Idaho mining partnership law and the parties' agreement the majority owner of the venture exercises day to day management and control of the mining operations to the exclusion of the minority owners of the venture.

STATUTES INVOLVED

Idaho Mining Partnership Law, *Idaho Code* §§ 53-402, 53-403, 54-405 and 53-410 are set out in Appendix C.

Idaho Workmen's Compensation Law, *Idaho Code* §§ 72-102(10) and 72-209 are set out in pertinent part in Appendix D.

CONCISE STATMENT OF CASE

Petitioners, as joint venturers with Sunshine Mining Company and their surety, paid 1.79 million dollars under the Idaho Workman's Compensation Act to the heirs and the estates of 91 miners and to other injured miners, as a result of the Sunshine Mine fire which occurred on May 2, 1972, near Kellogg, Idaho. Respondents manufactured polyurethane foam which was placed in the mine and which is alleged to have proximately caused the severity of the fire in question. The injured miners and the deceased miners' heirs and estates filed suits against respondents for damages. Additionally, Sunshine Mining Company and its insurance carrier filed actions against respondents, seeking to recover for the property damage and loss of profits suffered by the mine as the result of the fire. Respondents then filed third-party complaints in all their actions seeking contribution and indemnification from petitioners which own mining claims in the Sunshine Mine complex.

The Petitioners moved for summary judgment on all counts in the Idaho District Court. As to the wrongful death claims, Petitioners argued they are employers and thus immune from tort liability under the exclusive remedy provisions of the Idaho Workmen's Compensation Law and were a joint venture under Idaho mining partnership law. In the property damage action, Petitioners argued that their interests are so closely allied with those of Sunshine Mining Company that they should be treated as plaintiffs along with the miners heirs and estates and not third-party defendants.

The Idaho District Court granted Petitioners' motions for summary judgment on the wrongful death claims, stating that Petitioners were immune from liability under Idaho Workmen's Compensation Law because they were a joint venture, thereby making each member of the venture a direct employer. The district court further granted petitioner's motion for summary judgment on the property damage claim of Sunshine Mining Company on the ground that Petitioner's interests are so closely

allied with those of Sunshine Mining Company that they should be treated as plaintiffs and not third-party defendants.

The Ninth Circuit affirmed the district court's decision on the property damage claim, ruling that the petitioners stood in the same position as the original plaintiff, Sunshine Mining Company; but reversed the district court on the wrongful death claims finding only one employer because a majority of the control and management of the venture was in the hands of one of the joint venturers, Sunshine Mining Company. Thus, the Ninth Circuit held the Petitioners had the status of employers for purposes of suing for property damage, but were not employers for purposes of a third party claim for indemnity and contribution.

REASONS FOR GRANTING WRIT

The basic reason this Court should grant certiorari to review or summarily reverse this case is that the Ninth Circuit has failed to follow Idaho statutes and case law in deciding this case. The case involves the interpretation of Idaho's mining partnership law and Workmen's Compensation Law to determine if all joint venturers in a mining operation are or are not employers. The circuit court has decided that members of a joint venture who pay workmen's compensation premiums and ultimate compensation claims are not "employers" under Idaho Workmen's Compensation law if they do not have substantially equal rights in the management and control of the venture. The decision of the circuit court is contrary to the statutes of the state of Idaho and the decisional authority of the Idaho Supreme Court and decisions within other state courts whose workmen's compensation laws parallel the state of Idaho's.

The Idaho Supreme Court has ruled in *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597 (1966), that a joint venture is not a distinct legal entity apart from the parties composing it, and that for purposes of the workmen's compensation laws, the employees of the venture are the employees of each individual member of the venture. As joint employers, the members of the venture are liable for workmen's compensation awards, but once having paid those awards, the individual members are immune from any further liability. Members of a joint venture may, by agreement, have unequal control and management of the venture, or they may place the entire control and management of the venture in the hands of one of the joint venturers. *Eagle Star Insurance Company v. Bean*, 134 F.2d 755 (9th Cir. 1943); *Vicioso v. Watson*, 325 F. Supp. 1071 (C.D. Calif. 1971); *James Weller, Inc. v. Hansen*, 517 P.2d 1110 (Arix. 1973); *Fullerton v. Kaune*, 72 NM 201, 382 P.2d 529 (1963); *Nels E. Nelson, Inc. v. Tarman*, 163 Cal. App. 2d 714, 329 P.2d 953 (1958); *In Re McAnnely's Estate*, 127 Mont. 158, 258 P.2d 741 (1953) *Idaho Code* § 53-410

If this Court upholds the decision of the circuit court, an impossible situation arises with respect to mining partnerships in the State of Idaho. Mining partnerships are created by law, regardless of any expressed agreement to the contrary by the parties to become partners, and the relationship "arises from the ownership of shares or interest in the mine in working the same for the purposes of extracting the minerals therefrom." *Idaho Code* § 53-402. Members of a mining partnership share in the profits and losses in proportion to the interest they own in the mine, *Idaho Code* § 54-403, and the mining ground work by the partnership is partnership property, *Idaho Code* § 53-405. The member owning a majority interest in the mining partnership can control the methods of operating the mine. *Idaho Code* § 53-410.

Petitioners maintain that the decision of the district court should be upheld. The district court held that Petitioners/joint venturers in a mining enterprise are employers as defined in the Idaho Workmen's Compensation Law. *Idaho Code* § 72-102(10). As employers, the Petitioners are entitled to the protection of the statutory bar which prevents third party tort feasors (Respondents) from suing employers for contribution or indemnity. The statutory bar against suing employers is not limited. It bars all types of actions against employers including suits for property damage, personal injury and wrongful death. Petitioners contend that construing Idaho's mining partnership law in conjunction with Idaho's Workmen's Compensation Law results in the following scenario:

1. Idaho's mining partnership law creates a partnership regardless of the parties intent. *Idaho Code* § 53-402.
2. Idaho law requires workmen's compensation insurance for employees. *Idaho Code* § 72-209.
3. Idaho mining partnership law gives management and control of the venture through the party owning a majority interest in the mine. *Idaho Code* § 53-410.
4. Each member of the venture pays for compensation benefits to injured employees. *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597 (1966); *Idaho Code* § 72-209.

5. Idaho law provides that the employers shall be immune from liability for contribution or indemnity from third party tort feasers. *Idaho Code* § 72-209.

6. Idaho law provides that members of a joint venture are each employers under the workmen's compensation statutes. *Clawson v. General Insurance Corporation of America*, 90 Idaho 424, 412 P.2d 597 (1966)

Thus, Petitioners, as members of a joint venture, should be protected against third-party actions against the joint venturers when the joint venturers have already paid workmen's compensation premiums and benefits to their employees and employees families.

However, the circuit court, in its opinion, disregards Idaho law and holds that the minority owners of the mine are not immune from liability for contribution or indemnity. Such a decision leaves both a majority and a minority owner of the mine liable for workmen's compensation insurance, under Idaho law, but gives the minority owner no protection which thereby creates a double and unlimited liability for the minority mining partners of the joint venture. Petitioners as the minority members of the Sunshine Mining Company, now must, by law, pay workmen's compensation premiums and benefits, and if liable, pay damage claims to third-party tortfeasors.

Furthermore, the court of appeals ruled, in the property damage claim, that Petitioners stand in the same position as the Sunshine Mining Company as plaintiffs. Yet, the court, in the same opinion, states that Petitioners stand as defendants in the wrongful death action. It is difficult to comprehend that joint ventures, in a mining operation, have one legal status for one phase of the litigation and an exactly opposite legal status in relation to another aspect of the litigation. It seems aparent that if the extent of control over the mine is irrelevant in a property damage suite, the same result must attach to the wrongful death cause of action.

To summarize, the statutes and case law of Idaho point to only one conclusion: that members of joint mining ventures in Idaho are employers for all purposes. The Ninth Circuit has rejected Idaho's law and held that Petitioners are not employers for purposes of an indemnity and contribution suit brought against Petitioners by third-parties. Because this case is founded upon diversity of citizenship, the Ninth Circuit's opinion is erroneous.

CONCLUSION

For the reasons stated, we pray this Court summarily reverse the decision of the court below or in the alternative, grant a writ of certiorari. Summary reversal is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e.g. *Allegheny Corporation v. Breswick & Company*, 355 U.S. 415 (1958), *United States v. Palletz*, 330 U.S. 812 (1947), and four subsequent cases summarily reversed on the authority thereof reported in *United States v. Wheelbarger*, 331 U.S. 791 (1947), but also where the action of the lower court was clearly improper. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *White v. Howard*, 347 U.S. 910 (1954); *Franklin v. Jonco Aircraft Corporation*, 346 U.S. 868 (1953); and *Riss & Company v. United States*, 342 U.S. 937 (1952).

Respectfully submitted,

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June 30, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN HOUSE, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants.
No. 75-3079

HELEN HOUSE, et al.,
Plaintiffs-Appellants,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 76-1788

HELEN HOUSE, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.
No. 76-2650

SANDRA NORRIS, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 76-1789

SANDRA NORRIS, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, now known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.
No. 76-2650

ARJVELL E. FOWLER,
Plaintiff.
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

SUNSHINE MINING COMPANY, a corporation,
Plaintiff.
vs.
UNITED STATES OF AMERICA, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

No. 76-2650

ANTHONY CHARLES VANIER HARDEN, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants,corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

No. 76-2650

OPINION

Appeal From the United States District Court
for the District of Idaho

Before: WALLACE and SNEED, Circuit Judges, and
BOLDT,* District Judge.

SNEED, Circuit Judge:

These consolidated appeals come to us out of the litigation arising from the Sunshine Mine fire on May 2, 1972, in Kellogg, Idaho, in which over 90 miners died. The initial plaintiffs in this complex litigation were surviving relatives of those miners killed in the fire. Named as defendants in this wrongful death action were the United States, a number of companies involved in the manufacture and sale of a kind of polyurethane foam used in the mine, and others involved in the manufacture and use of self-rescue units used in the mine. Among these defendants were Polytron and PVO International, Inc., manufacturers of polyurethane foam. So far as the record reveals the Sunshine Mining Company was not named as a defendant in this initial suit.

After this initial suit had been filed, other suits were also instituted. Among these additional filings was a suit by Sunshine Mining Company, as plaintiff, seeking to recover for property damage to the mine and loss of profits. Another suit was brought on behalf of several insurance companies seeking recovery of moneys paid to Sunshine Mining Company for the property damage suffered in the fire. Included among the defendants in these suits were PVO and Polytron. These actions were then consolidated with the original wrongful death action.

PVO and Polytron then filed third party complaints in all the consolidated actions against eight small mining companies associated with the Sunshine Mining Company, seeking contribution or indemnity from them if PVO and Polytron should be found liable. These eight small companies, who were not named as defendants in any of the original actions, will be referred to as third-party defendants.

The District Court has jurisdiction of the actions against the United States by virtue of 28 U.S.C. § 1346. Diversity of citizenship is the basis of the federal court jurisdiction over the other causes of action. 28 U.S.C. § 1332.

*Hon. George H. Goldt, Senior United States District Court Judge, for the District of Washington, sitting by designation.

On this appeal we must decide whether 60 plaintiffs were properly dismissed from the action against the United States for failure to comply with the administrative claim requirement of the Federal Tort Claims Act and whether summary judgment was properly entered in favor of the third-party defendants who claimed the benefit of the immunity clause of the Idaho Workmen's Compensation Act. Our resolution of these issues requires that we affirm in part, reverse in part, and remand in part.

I.

Administrative Claim Requirement.

The complaint against the United States charges that the United States Department of the Interior, Bureau of Mines, was negligent in inspecting and enforcing safety standards at the Sunshine Mine. Suit was brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., (FTCA), which is a waiver of sovereign immunity in those cases "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured." 28 U.S.C. § 1346(b).

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States for money damages for . . . death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency in writing . . . " 28 U.S.C. § 2675(a). The Ninth Circuit has explicitly held that this administrative claim requirement is jurisdictional in nature and cannot be waived. *Blain v. United States*, 552 F.2d 289 (9th Cir. 1977). Therefore, unless we find that proper administrative claims were filed for the 60 plaintiffs before us on this appeal, the order of dismissal must be upheld.

A. Facts.

A document labeled "Notice of Claim" was filed with the Department of Interior by Jack Ormes, an attorney, on December 29, 1972. This document set forth a description of the accident and the alleged negligence of the Bureau of Mines. In addition, specific claims for $1,000,000 in damages per family were made on behalf of certain named members of the families of 50 of the miners. This Notice of Claim was signed by Mr. Ormes. After this document was received, the Department of the Interior

requested that a Standard Form 95 (SF 95) be filed for each claimant. A single SF 95 was prepared for each family, with the surviving spouse and children listed in space #2 labeled "Name of Claimant." A line was drawn through the rest of the form. At the bottom of each form were was a notation reading "See Notice of Claim submitted by Jack R. Ormes, Attorney at Law." Most of the SF 95s were signed by the surviving widow, though some were signed by Mr. Ormes. Attached to some of the SF 95s were survivors lists, containing the names of all family members, including some adult children who were not listed in the claimant space on the form itself.

After the Notice of Claim had been filed, other families apparently contacted Mr. Ormes. SF 95s were filed for these additional families. Again, the form was left blank except for the name of the claimants and the notation to "See Notice of Claim submitted by Jack R. Ormes, Attorney at Law." However, the Notice of Claim contained no mention of either the decedent of any of these claimants or any of the claimants themselves.

Since no action was taken on these claims by the Department of the Interior within the six month time period specified by 28 U.S.C. § 2675, the claimants were justified in treating this inaction as a final denial of their claims. Complains were then filed in the United States District Court for the District of Idaho. The list of plaintiffs included some persons who were not included on either a SF 95 or the Notice of Claim and some who were listed on only one of these documents. In two separate motions the government requested that 60 plaintiffs be dismissed because of their alleged failure to file proper administrative claims. The District Court granted this motion.

Appellants, the 60 plaintiffs dismissed from the suit against the United States, can be grouped into five categories. The first and largest group (Group 1) consists of those appellants listed on a SF 95 as a claimant or survivor, but whose families are not listed on the Notice of Claim.[1] The second group (Group 2) consists of

[1] Evelyn Anderson, Gerald Anderson, Ronald Anderson, Mahaley Birchett, Timothy Birchett, Joretta Birchett, Marshall Birchett, Billy Birchett, Loretta Birchett, Patricia Castell, Kerry Casteel, Sherri Casteel, Betty Lou Goff, Rose Ann Goff, Dorothy Johnson, Lynnel Johnson, Paula Stevenson, Sandra Norris, Christine Norris, Carey Norris, Freda Peterson, Dustin Peterson, Janice Rossiter, Tina Rossiter, Mary Ann Russell, Kenneth Russell, Shawn Russell, Scott Russell, Molisa Salyer, Yvonne Walty, Deborah Walty, Denise Walty, William Walty, Jr.

those appellants who were named neither in the Notice of Claim nor a SF 95, but whose mothers filed a SF 95.[2] The third category (Group 3) is composed of two people who were listed only as survivors on a SF 95 filed by their respective mothers, and whose mothers were listed on the Notice of Claim.[3] A fourth group (Group 4) consists of those individuals who were listed on the Notice of Claim, but who never filed a SF 95.[4] A final group (Group 5) consists of children listed as claimants on a SF 95, whose mothers are listed on the Notice of Claim.[5]

B. Incorporation by Reference.

Group 1 is seeking to use the doctrine of incorporation by reference to establish that they filed complete administrative claims. The SF 95s filed by Group 1 appellants contained only the names and the notation to "See Notice of Claim." Unless the incorporation of the Notice of Claim is effective, these claims are clearly incomplete.

We agree with Group 1 appellants that incorporation by reference can be used in presenting an administrative claim. *See Molinar v. United States*, 515 F.2d 246, 249 (5th Cir. 1975). There is no requirement that an administrative claim be presented solely on a SF 95. Rather, the regulations explicitly allow "an executed Standard Form 95 or other written notification." 28 C.F.R. § 14.2(a) (1977). Thus we read these claims to incorporate the Notice of Claim.

However, we are unable to agree with appellants that incorporation of the Notice of Claim supplies "a claim for money damages in a sum certain" as required by 28 C.F.R. § 14.2(a). This requirement has been strictly enforced by the courts. *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974) (listing damages as unknown inadequate); *Bialowas v. United States*, 443 F.2d 1047 (3rd Cir. 1971) (estimated damages inadequate). Just recently this circuit has ruled that a class claim for damages is inadequate to state a sum certain for the damages suffered by the individual

[2] Christine Beachel, James Beachel, Glen Beachel, Lara Beachel, Donald Peterson, Barry Peterson, Terri Ingells, Sharon Hays, Becky Richmond.

[3] Barbara Carlson, Gloria Peninger.

[4] Linda Jenkins, Sherry Nichols, Robert Case, Angela Rapier, Christopher Rapier, Douglas Jackson, Thomas Jackson.

[5] Tina Allison, Michael Delbridge, Cheryl Delbridge, Judy Whatcott, Laurie Whatcott, Kathleen Wilson, Violet Wilson, Wanda Wilson, Brenda Wilson.

filing the claim. *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977).

In the instant case the amount claimed by each family listed on the Notice of Claim was stated separately. Since none of the families in Group 1 was included on the Notice of Claim, there is no amount which explicitly can be incorporated from the Notice. The appellants argue, however, that since each of the families listed on the Notice of Claim claimed $1,000,000 in damages, it is clear from their reference to the Notice of Claim that they also intended to claim $1,000,000 in damages per family.

We are not convinced. Damages properly reflect an individualized determination of losses suffered. Families in differing economic circumstances would be expected to suffer differing damages for the wrongful death of the breadwinner. The mere fact that all the families listed on the Notice of Claim demanded $1,000,000 does not mean that all other families who later choose to file claims would also claim a similar amount. To constitute "a claim for money damages in a sum certain" either the document incorporating another or the incorporated document must set forth a sum certain claim of damages *explicitly* applicable to the claimant or group of claimants. Thus, had the $1,000,000 figure been set forth explicitly of the SF 95, or had the Notice of Claim provided that the $1,000,000 demand was applicable to all SF 95s that incorporated the Notice, the sum certain claim requisite would have been met. Neither circumstance existed in this case.

We recognize that government employees in the Department of the Interior docketed the claims of Group 1 families at a value of $1,000,000. This circuit has held, however, that "some undefined principle of estoppel" will not operate to prevent the government from asserting jurisdictional requirements. *Powers v. United States*, 390 F.2d 602, 604 (9th Cir. 1968). We also note that this circuit has consistently rejected the argument that mere notice to the government of an accident and injury is sufficient to satisfy the administrative claim requirement. *Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972). Thus, the government's interpretation of imprecise documents in the manner intended by the appellants does not affect our task of determining whether the administrative claim requirement has been met. We hold, therefore, that the appellants in Group 1 failed to include a sum certain claim for damages in their administrative claims and so were properly dismissed.

Our disposition of the arguments presented by Group 1 also mandates the result for Group 2. Assuming *Arguendo* that the claims of these children were adequately presented by the claims filed by their mothers, there still would be a failure to state a sum certain because no one in the families represented by Group 2 was listed on the Notice of Claim and the only information contained on the mothers' SF 95 was a notation to "See Notice of Claim." Nowhere was a sum certain claim explicitly linked to the mothers of these children. Thus, the order of dismissal as to Group 2 must also be affirmed.

C. Requirement That Individual Claims Be Filed.

Group 3 consists of two adult children who were not listed as claimants on the SF 95 filed by their respective mothers, but were included on an attached list of "survivors." Both their mothers were listed on the Notice of Claim, so incorporation by reference can be used to provide a sum certain claim for damages for each of these families. The explicit link exists provided the SF 95s are adequate. In making this determination, we are not particularly concerned by the fact that they were listed as survivors rather than claimants on their mothers' SF 95. Rather the underlying issue presented here is whether adult claimants must file an individual claim or whether they can be effectively included in a claim filed by their mother.

We realize that state law determines who may present a claim based on death. 28 C.F.R. § 14.3(c). Idaho law provides that the right to bring a wrongful death action belongs to the heirs of the decedent. *Idaho Code* § 5-311. Heirs are defined to include the surviving spouse and issue. *Idaho Code* §§ 15-2-102 & 15-2-103. These Idaho statutes have been interpreted as providing a joint and indivisible cause of action for the heirs. *Campbell v. Pacific Fruit Express Company*, 148 F. Supp. 209, 211 (D. Idaho 1957).

We do not think, however, that *Campbell* authorizes a single heir to file an action on behalf of all others. On the contrary, the *Campbell* court dismissed the action because of the failure to join all the heirs.[6] The fact that each heir is an indispensable party in a

[6] The California courts have interpreted a similar wrongful death statute as requiring compulsory joinder, rather than creating a joint cause of action. *Cross v. Pacific Gas & Electric Co.*, 36 Cal. Rptr. 321, 388 P.2d 353 (1964). In that case the court approved a tolling of the Statute of Limitations for minor plaintiffs despite the fact that the adult heirs were barred by the running of the statute. Similarly, in this case, each heir should be required to individually satisfy the administrative claim requirement even though all must join together in a single suit.

wrongful death action does not dispose of the issue whether the parent has inherent authority to file an administrative claim on behalf of an adult child. However, it does suggest that the parent lacks full power to litigate such actions on behalf of adult children. In view of this limitation, but mindful of the absence of precise Idaho authority, we believe it is more consistent with Idaho law and the purposes of the requirement of an administrative claim to hold that the parent has no inherent authority to file an administrative claim on behalf of an adult child.

The claim requirement was designed to provide the government with accurate information as to the settlement value of the case.[7] The number of heirs who can claim damages for the death is obviously an important factor in determining the value of the claim. However, only those heirs who will participate in the suit need be considered in ascertaining damages. Requiring individual administrative claims will provide the government with more accurate information as to the number of heirs who are interested enough to pursue the action and so should be considered in figuring the settlement value.[8]

Family claims filed by the mother should be measured against the principles which invalidated the class administrative claim in *Caidin v. United States, supra* and *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3rd Cir. 1975). In *Caidin* we held that a class administrati was not valid unless there was a contemporaneous assertion of authority for the class representative to act for each of the class members. Similarly, we think that before one family member can present a joint claim on behalf of all adult members of the family, there must be a showing that such person is authorized to represent such other members.

Because the record discloses no evidence indicating that the Group 3 appellants authorized their mothers to act for them, we

[7] The purpose behind requiring the filing of an administrative claim was to "expedite the fair settlement of tort claims asserted against the United States." 1966 U.S. Code Cong. & Ad. News 2516.

[8] *Van Fossen v. United States*, 430 F. Supp. 1017 (N.D. Calif. 1977) can be distinguished from the instant case because there the alleged defect in the administrative claim, the failure to present the claim in the name of a personal representative as required by Virginia law, did not interfere with settlement negotiations.

shall remand to the district court for a determination as to whether such authority existed at the time the claims were filed.

D. Authority of Attorney to File Notice of Claim.

The Group 4 appellants appear only on the Notice of Claim and insist that it alone is a valid administrative claim. We agree that any "written notification of an incident, accompanied by a claim for money damages in a sum certain" constitutes a valid administrative claim. 28 C.F.R. § 14.2(a). The Notice of Claim filed here provides such information. The problem Group 4 encounters is that the Notice of Claim is signed only by Ormes, the attorney. There is no indication in the record that Ormes had any authority to represent Group 4 appellants. In this respect Group 4-s problem is identical to that of Group 3.

As already indicated, the claim must "be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative." 28 C.F.R. § 14.3(e).

Somewhat surprisingly the government did not argue that the failure to show Ormes' authority invalidated the administrative claims of Group 4. Instead, the government agreed to accept reinstatement of this group. As noted above, however, the administrative claim requirement is jurisdictional and the government is powerless to waive it. A proper claim must be filed and denied before there is any federal court jurisdiction to hear these actions.[9]

[9] Our decisions in *Blain v. United States*, 552 F.2d 289 (9th Cir. 1977), and *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977), logically lead us to this conclusion. It could be argued that *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 326-32 (1976), are inconsistent with this position. There, the Supreme Court waived strict compliance with the finality requirement for jurisdiction under 42 U.S.C. § 405(g). The Court in *Eldridge* stated that administratively imposed exhaustion of remedies requirements could be waived by the Secretary, while only the presentation of the claim requirement was jurisdictional. *Id.* at 328. There is a difference, however, between an agency's waiving the exhaustion requirement to perfect a claim and the filing of a claim itself. Both *Salfi* and *Eldridge* adhere to this distinction. The first may be waived in certain cricumstances, but the latter is statutorily required and may not be waived by the government.

Here, the statute requires the filing of a "claim." 28 U.S.C. § 2675(a). What is required to qualify as a claim is established by regulation. 28 C.F.R. § 14.2. The purported claims did not qualify as "claims" and, therefore, there is no jurisdiction. Thus, *Salfi* and *Eldridge* provide no reason for us to discontinue or insistence stated in *Blain* and *Caidin* that these claim requirements be satisfied.

Therefore, in a manner similar to our disposition of Group 3, we must remand to the district court for a determination of whether Ormes was indeed authorized to represent Group 4 appellants at the time the Notice of Claim was filed. Unless the district court is presented with evidence documenting this authority, the order dismissing these appellants must also be affirmed. Our remand with respect to Groups 3 and 4 is not a strict application of 28 C.F.R. § 14.3(e), for such would require us to dismiss their claims. We have softened its vigor because these two groups present problems not previously considered by this court and because, with respect to Group 4, the government's reinstatement of their claims indicates that any failure to comply was not prejudicial to the government. This departure from the literal language of the regulation does not indicate a willingness to treat the failure of the agent executing the administrative claim (1) to show his "title or legal capacity" and (2) to accompany the claim with "evidence of his authority" to present such claim as merely technical defects. Such a failure, in the absence of unusual and extenuating circumstances such as exist in this case, deprives the court of jurisdiction to hear the suit. We expressly disapprove of *Hunter v. United States* 417 F. Supp. 272 (N.D. Cal. 1976) to the extent that it can be interpreted as holding to the contrary.

E. Authority of Parents to File For Minor Children.

The final group of appellants, Group 5, consists of children who were listed as claimants on a SF 95 prepared by their mothers, but who were not individually listed on the Notice of Claim as having a $1,000,000 claim. Thus, there exists the explicit link which is required and the incorporation by reference of the Notice of Claim was effective to state a sum certain claim for the family group. However, the SF 95s were signed by the surviving spouse in each case and the children did not individually and separately present their claims.

If any of the children in this group are adults, their situation would be indistinguishable from that of Group 3. It appears, however, that at least some of the children in this group are minors. We hold that since the parent has inherent authority to represent the interest of a minor child, a joint claim filed by a mother on behalf of her children is appropriate. The parent of a minor child is a "person legally entitled to assert a claim for [wrongful death] in accordance with applicable state law. 28 C.F.R. § 14.3(c). *Idaho Code* § 15-1-403(b)(2) provides that a parent may represent and bind his minor child in judicial

proceedings. Since the parent is the automatic legal representative of the child once the issue progresses to the litigation stage, it would be inappropriate to require a recitation of the minority of the children and the applicable state law at the administrative claim stage. The government's ability to settle the case is not hampered by not requiring these recitations inasmuch as the parents can accept a settlement for the child. We remand to the district court for a determination as to which of these appellants are minors and so entitled to reversal of the order of dismissal entered against them. With respect to those not minors the district court must determine, as it must with respect to Group 3, whether at the time the claims were filed their respective mothers had authority to file for them.

II.

Third Party Actions.

As already mentioned, consolidated with the appeal from the dismissal of the 60 plaintiffs is an appeal order of summary judgment in favor of the third party defendants, the eight small mining companies. This appeal requires us to determine whether the third party defendants are employers under the terms of the Idaho Workmen's Compensation Act and so entitled to immunity from tort liability and whether they are proper third party defendants in the action brought by Sunshine Mining Company.

A. Facts.

It will be recalled that, in addition to their claims against the United States under the FTCA, the plaintiffs named other defendants in this action, including PVO International, Inc. and Polytron Company, manufacturers of a polyurethane foam which had been installed in the mine and allegedly contributed to the quick spread of the fire. Additionally, Sunshine Mining Company and its insurance carrier filed actions against these defendants, seeking to recover for the property damage and loss of profits suffered by the mine as the result of the fire. PVO and Polytron then filed third party complaints in all these actions seeking contribution and indemnity from eight small companies which own mining claims in the Sunshine Mine complex. These claims were being worked by the Sunshine Mining Company. The third party complaints allege that these small companies had a duty to see that their claims were being operated safely and that the failure to fulfill this duty was the proximate cause of plaintiff's damages.

The third party defendants moved for summary judgment on all counts. As to the wrongful death claims, the third party defendants argued that they are employers and thus immune from tort liability under the exclusivity provisions of the Idaho Workmen's Compensation Act. In the property damage action brought by Sunshine Mining Company, the third party defendants argued that their interests are so closely allied with those of Sunshine that they should be treated as plaintiffs and not third party defendants. The district court granted summary judgment on all counts. We reverse as to the wrongful death claims and affirm as to the property damage action.

B. Idaho Workmen's Compensation Act.

Appellants, PVO and Polytron, insist that the eight small mining companies are not employers and so are not elible for any immunity granted by the Idaho Workmen's Compensation Act. We agree.[10]

1. Direct Employer.

The Idaho Code defines an employer as "any person who as expressly or impliedly hired or contracted the services of another." *Idaho Code* § 72-102(10). This statutory language forcuses on the party making the hiring decision. Prior to 1971 when the above definition was added to the Code, the Idaho cases, decided under the common law, established that the right to control and direct the activities of the workers is the key factor in finding an employer-employee relationship. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). Thus, it is necessary to examine the operating agreements entered into by the third party defendants and Sunshine Mining Company to determine who had the right to hire workers and who exercised control over the activities of the miners.

Our job of interpreting these agreements is made more difficult by the fact that there are seven different agreements involved here. However, they share certain features. Sunshine Mining Company is given the exclusive right to conduct development and mining operations on all the claims owned by the small

[10] Our disposition of this issue makes it unnecessary for us to determine whether Idaho law extends the immunity provided by the Workmen's Compensation Act to a suit for contribution and/or indemnity brought by a third party. *See* Larson, Workmen's Compensation Law, §§ 76.21 and 76.42 (1976).

companies covered by these agreements. Most of the agreements give Sunshine the right to suspend operations and require that, even if the other party wishes to independently finance continued operations, Sunshine must be engaged to do the actual work. The agreements generally give the non-operating party a right to inspect the operation, but actual control over operations is vested in Sunshine. It is thus apparent that Sunshine Mining Company alone has the right to control the day to day activities of the miners. These agreements do not specify expressly who has the right to hire workers, but a strong and permissible inference is that the owners of the non-operating interests could not do so.

The unit agreement entered into by Sunshine, Hecla and Silver Dollar, which covers the area in which the fire took place, is even more explicit in investing Sunshine Mining Company with exclusive *control* over the workers. Article VII of that agreement provides that "the number of employees of the unit operator and their selection and the terms of labor and compensation for services performed, shall be determined by the unit operator, and the said employees shall be the employees of the unit operator." To assert that this does not give Sunshine the exclusive power to hire requires a taste for literalism beyond reason. We hold that under both tests for establishing a direct employer, Sunshine Mining Company must be considered the sole direct employer.

Third party defendants present two arguments in an attempt to avoid this conclusion. They rely on the Idaho mining partnership law, *Idaho Code* § 53-401 et seq., and the Idaho cases concerning joint ventures. Since the workmen's compensation act specifically allows partnerships or associations to be employers, *Idaho Code* § 72-102 (19), they argue that the joint entity created by the operating agreement is the direct employer. Should the entity not be recognized under Idaho law it follows, they argue, that each member of the entity must be considered the employer.

We agree that some form of joint venture existed here. We also recognize that control need not be shared equally between members of a joint venture, but can be delegated to one member of the group. *Shell Oil Company v. Prestidge*, 249 F.2d 413 (9th Cir. 1957). Thus, the limited control retained by third party defendants here does not preclude classification of these arrangements as joint ventures. We remain convinced, however, that under the terms of the unit agreements Sunshine alone was the direct employer.

Our holding requires that we examine *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597, 601 (1966). In *Clawson* the Idaho Supreme Court held that "a joint venture is not an entity separate and apart from the parties composing it." Thus, there is no separate entity which can be considered the employer. Moving from this unassailable position, third party defendants insist that *Clawson* requires that members of a joint venture always be considered joint employers of those working for the venture. While *Clawson* treated members of the joint venture as joint employers it did so with respect to its particular facts. In *Clawson* two contractors formed a joint venture to construct a school. The joint venture, as such, had no insurance coverage, but each individual member of the joint venture was covered by a surety bond. The Idaho court held that an injured worker could claim against both of the sureties covering the individual members of the joint venture.

The *Clawson* court, in so holding, emphasized that the member's activities in the joint venture project were of the same type which they pursued in their private businesses in which both were then also actively engaged. Moreover, it does not appear that one member was subservient to the other with respect to the affairs of the joint venture. Under such circumstances the court, having refused to treat the joint venture as the employer, had no choice but to treat each member thereof as the employer. Being indistinguishable, parity of treatment was required.

Parity, however, may be improper when the members are distinguishable. Indeed, to establish the employer for the purposes at hand, once the joint venture is discarded, requires that each member be measured against Idaho's employer-determining tests. To discard the entity, on the one hand, and to then treat the members of the venture as fungible, on the other, is to do ultimately what initially one refused to do. Once the entity is swept away the members should be treated as individuals for the purposes at hand. To do otherwise is to reintroduce the entity.

Approached in this manner our conclusion becomes inevitable. Third party defendants did not work the mines. Sunshine did. Third party defendants did not control the employees. Sunshine did. Third party defendants did not have rights with respect to each and every joint venture. Sunshine did. Third party defendants did not hire the employees. Sunshine did. To clothe third party defendants with Sunshine's apparel merely

because a joint venture existed would be inconsistent with *Clawson*'s rejection of entityship for joint ventures.

We recognize that third party defendants contributed to the costs of the workmen's compensation insurance coverage, under the cost-sharing provisions of the operating agreements. This is not the decisive factor in fixing the identity of the direct employer eligible for immunity under the statute. In order to avoid distorting the direct employer concept beyond recognition, the element of control over the employee must be present. This position is supported by recognition in the Idaho statute of an additional group, Statutory Employers, which receives employer treatment although they are not direct employers. *See* §2 *infra*. This strongly suggests a legislative intent to restrict employer treatment to hose who meet the ordinary employer-determining tests or come within the special statutory definition. Only Sunshine meets the ordinary tests; hence, we hold that it alone is the direct employer of the miners killed in the fire.

2. Statutory Employer.

The Idaho statute provides that employer also

> "includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who . . . for any other reason, is not the direct employer of the workmen there employed." *Idaho Code* §72-102(10).

Since the third party defendants do own some of the property being mined, it is argued they fit within the category of stratutory employer.

The cases have established that right to control is *not* a factor in determining who is a statutory employer. *Miller v. FMC Corp.*, 93 Idaho 695, 471 P.2d 550 (1970). Indeed, the purpose of including the special statutory definition was to broaden the concept of employer beyond what was recognized at common law. *Adams v. Titan Equipment Supply Corp.* 93 Idaho 644, 470 P.2d 409 (1970).

However, in a series of cases interpreting Idaho law, this circuit has established that the statutory employer classification is only available to those owners who are also an operator of the business being carried out by the workers. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956); *Roy v. Monsanto Company*, 420

F.2d 915 (9th Cir. 1970). Thus, in the *Monsanto* case a manufacturing company was held not to be the employer of workmen hired by a construction company engaged in new construction at the manufacturing plant. The court found that Monsanto was not in the construction business and so could not be the employer of the construction workers.

Here, the small companies are not actively involved in the operation of the mine. They are not "the operators of the business there carried on." They do share in the profits of the mining business being carried on, but theirs is a non-operating interest. Their position, while not identical, is similar in relevant respects to that of one who contracts to have work done for him. The Idaho cases, relied on in the *Monsanto* case, clearly establish that such a person is not an employer under the statutory definition, even though he benefits from the work done. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943) (physician who contracted to have a house built is not the employer of workmen involved in the construction); *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948) (city which contracted for construction of sewer is not employer of workmen hired by subcontractor). Thus, we hold that the third party defendants are not statutory employers.[11] Since they are neither direct nor statutory employers of the miners, the statutory immunity is not available and the grant of summary judgment must be reversed.

C. Third Party Complaint in Sunshine Mining Company Action.

Third party defendants were also named by PVO and Polytron as third party defendants in the action brought by Sunshine Mining Company against them for damages to the mine. The district court also granted summary judgment in favor of the third party defendants in this action. We agree that a third party complaint seeking contribution and indemnity must fail when the third party defendant stands in the same position as the original plaintiff. In this situation the third party defendant's liability is not the secondary or derivative liability required for impleader. *See* Wright and Miller, Federal Practice and Procedure § 1446. Instead a motion under Rule 19 to add the alleged third party defendant as a necessary plaintiff would result in the proper alignment of parties. On the record before us, third party defendants, by virtue of the operating agreements, share with

[11] This holding makes it unnecessary to decide the extent of the exception to employer tort immunity provided by *Idaho Code* § 72-223.

Sunshine Mining Company the interest in the mine. Thus, the third party complaint against them was improper and the grant of summary judgment on this action is affirmed.

Affirmed in part, Reversed in part, Remanded in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO[1]

HELEN HOUSE, et al., *Plaintiffs,* vs. MINE SAFETY APPLIANCE COMPANY, et al., *Defendants,* and POLYTRON COMPANY, now known as POLYCO LIQUIDATING CORPORATION, a California corporation, *Third Party Plaintiff,* vs. SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; UNITED STEELWORKERS OF AMERICA; LOCAL UNION NO. 5089 OF THE UNITED STEELWORKERS OF AMERICA, *Third Party Defendants.*	) Civil No. 1-73-50) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment of Third Party Defendant, SUNSHINE MINING COMPANY, having come

[1] The Sunshine Mine case included the above case and two other cases against the same defendants: *Ajrvell E. Fowler v. Mine Safety Appliances Company, et al.*, Civil No. 1-74-70 and *Sandra Norris, et al. v. Mine Safety Appliance Company*, Civil No. 1-74-71. The cases were consolidated for trial, and the judgments and orders are identical in each case.

on regularly for hearing, pursuant to notice, on the 23rd day of April, 1976, before the above entitled Court, and it appearing to the Court that the files reflect that due and regular service of said motion having been given by said Third Party Defendant to all the Plaintiffs, Third Party Plaintiffs and all Defendants in these consolidated actions, and

It appearing to the Court that said Third Party Defendant above named was represented by E. L. Miller of the lawfirm of Miller & Knudson, Coeur d'Alene, Idaho, and the Third Party Plaintiff, POLYTRON COMPANY, was represented by Michael Brady of the lawfirm of Moffatt, Thomas, Barrett & Blanton of Boise, Idaho, and

It further appearing to the Court that there is no genuine issue of any material fact pertaining to the Third Party Plaintiff's several claims against this Third Party Defendant, and the matter having been fully briefed by each and all of said parties, which briefs were duly submitted to the Court and the Court having heard oral arguments on the contentions of each of said parties,

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED, that the Third Party Complaint fails to state a claim for which relief may be granted and that the Third Party defendant above named is, under the satatutes of the State of Idaho, immune from any claim of indemnity and/or contribution on the theory of tort as sought by the Third Party Compalint, and

IT IS HEREBY FURTHER ORDERED, AND THIS DOES ORDER, ADJUDGE AND DECREE, that the Motion for Summary Judgment of this Third Party Defendant shall be and the same is hereby granted as a matter of law as to all claims made by Third Party Plaintiff against this Third Party Defendant.

That pursuant to Rule 54, Federal Rules of Civil Procedure, there is no just reason for delay in the final decision and the Court expressly directs that a judgment be entered in favor of this Third Party Defendant and against the above entitled Third Party Plaintiff, and

Further that costs shall not be awarded by or against any of the parties hereto.

DATED this 10th day of May, 1976.

Ray McNichols

JUDGMENT

Pursuant to the order granting summary judgment in favor of the Third Party Defendants, SILVER DOLLAR MINING COMPANY, POLARIS MINING COMPANY, HECLA MINING COMPANY, BIG CREEK APEX MINING COMPANY, SILVER SURPRIZE, INC., SUNSHINE CONSOLIDATED, INC., SILVER SYNICATE, INC., BISMARK MINING COMPANY and METROPOLITAN MINES CORPORATION, LIMITED, and against the Third Party Plaintiff, POLYTRON COMPANY, in the above entitled cause dated the 6th day of May, 1976,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE That the Thrid Party Plaintiff have and recover nothing from these Third Party Defendants, and that said Third Party Defendants be and hereby are forever dismissed from the above entitled cause, with judgment granted to these Third Party Defendants, and the Third Party Plaintiff in the above entitled cause shall have and recove nothing from these Third Party Defendants; and it is further adjudged that as and between the Third Party Plaintiff and these Third Party Defendants, each shall bear their own costs.

DATED This 6th day of May, 1976.

Ray McNichols, Judge

APPENDIX C

The Idaho Mining Partnership Law, *Idaho Code* § 53-402, 53-403, 53-405 and 53-410 state as follows:

> "53-402. Express agreement not necessary. — An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interest in the mine and working the same for the purpose of extracting the minerals therefrom."

> "53-403. Sharing profits and losses. — A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine, bears to the whole partnership capital or whole number of shares."

> "53-405. Mine partnership property. — The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property."

> "53-410. Majority of shares governs. — The decision of the members, owning a majority of the shares or interests in a mining partnership, binds it in the conduct of its business."

APPENDIX D

The Idaho Workmen's Compensation Law, *Idaho Code* §§ 72-102(10) and 72-209 state in pertinent part:

> "72-102(10). 'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured, it means his surety so far as applicable."

> "72-209. Exclusiveness of liability of employer. — (1) Subject to the provisions of section 72-223, the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns.
>
> (2) The liability of an employer to another person who may be liable for or who has paid damages on account of an injury or occupational disease or death arising out of and in the course of employment of an employee of the employer and caused by the breach of any duty or obligation owed by the employer to such other person, shall be limited to the amount of compensation for which the employer is liable under this law on account of such injury, disease, or death, unless such other person and the employer agree to share liability in a different manner.
>
> (3) The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety, provided that such exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto."